Filed 3/5/09 In re D.P. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re D.P., a Person Coming Under the Juvenile Court Law.	B208500
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. D.P., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK58195)

APPEAL from an order of the Superior Court of Los Angeles County. Stephen Marpet, Judge. Affirmed.

Kimberly A. Knill, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

D.P., Sr. (father), father of D.P., appeals from an order of the juvenile court summarily denying his Welfare & Institutions Code section 388 petition.[1] Father contends that the juvenile court abused its discretion in denying father an evidentiary hearing on the petition because father adequately pled a prima facie case showing changed circumstances or new evidence. We find no abuse of discretion, and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Initial detention

In January 2006, D.P. was born to father and M.A. (mother). At the time of D.P.'s birth, D.P.'s siblings were dependents of the court and father and mother were receiving services. The Los Angeles County Department of Children and Family Services (DCFS) offered father and mother a voluntary reunification contract under which D.P. would be placed in his maternal grandmother's home with his siblings while the parents completed services. Under the contract, father would complete parent education, drug abuse counseling and testing, and individual counseling.

After signing the case plan, father became infuriated in the presence of the DCFS social worker. He stated that he would not comply with the case plan, would not visit with the child, and he began verbally abusing mother. When the social worker spoke with father again shortly thereafter, he questioned his paternity and requested a paternity test.[2] Father failed to enroll in any of the required programs despite the availability of low cost programs and a bus pass.

On July 27, 2006, DCFS filed a section 300 petition on behalf of D.P., alleging that he came within the jurisdiction of the juvenile court under section 300, subdivisions (a), (b) and (j). The petition alleged that mother had a history of substance abuse including amphetamine and methamphetamine; father had a history of substance abuse

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

[2] DNA results confirmed that father is D.P.'s biological father.

and was a frequent user of marijuana; D.P.'s four older siblings[3] were current and former dependents of the court due to mother's illicit drug abuse and violent confrontations with father; mother and father engaged in physical confrontations, exposing the children to domestic violence; and father used inappropriate physical discipline with D.P.'s siblings. D.P. was ordered detained with maternal grandmother, with whom he had been living since shortly after his birth.

2. Jurisdiction/disposition hearing

On August 23, 2006, the jurisdiction/disposition hearing took place. DCFS filed a report on the same date. Father had informed DCFS that he was willing to participate in no-cost programs, but he did not feel that it was necessary. According to mother, father had repeatedly told her that he "will not comply with the case plan." Despite being allowed to visit with the child twice per week for a duration of two hours, father had only visited D.P. once for a brief period of time. As a result of his inconsistent visitation, father had not bonded with D.P.

DCFS recommended offering the parents six months of reunification services. The maternal grandmother indicated that she was willing to adopt D.P. if reunification efforts failed. The court set the matter for mediation.

3. Mediated agreement

On October 4, 2006, the parties entered into a mediated agreement, which the juvenile court adopted. The court found true an amended section 300 petition, which alleged that the parents' drug abuse histories rendered them unable to provide regular care for D.P.; D.P.'s siblings were dependents of the court based on mother's drug use, domestic violence between mother and father, violence between mother and the grandmother, and failing to protect the children from father's abuse; the siblings were exposed to domestic violence between mother and father in 2004; and, in 2004, father inappropriately disciplined D.P.'s siblings with a belt.

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[3] Father is not the father of D.P.'s older siblings, who are not subjects of this appeal.

The court declared D.P. a dependent under section 300, subdivisions (b) and (j), removed him from parental custody for placement with the maternal grandmother, and ordered reunification services for both parents. Specifically, the court ordered that father complete a parenting program, participate in drug counseling and testing, and attend domestic violence and individual counseling. Mother and father were granted monitored visits, with father's visits to occur twice a week for two hours.

By October 2006, father had enrolled in drug counseling and parent education. He had tested negative for drugs twice. Father had yet to enroll in domestic violence counseling or individual counseling.

4. Six-month review

The six-month review hearing took place on March 26, 2007. DCFS reported that D.P. continued to reside in the home of his maternal grandmother, where he was thriving. The parents were living together. Neither were employed, but both were actively participating in the case plan and visitation. Father was attending drug counseling, individual counseling, parenting classes, domestic violence counseling, Alcoholics Anonymous (AA)/Narcotics Anonymous (NA) meetings, and was testing for drugs, though, he had missed four tests. Father also visited D.P. on a monitored and unmonitored basis one to two times per week and was appropriate during the visits. DCFS was optimistic about family reunification.

The court ordered DCFS to provide further services; liberalized the parents' visits to unmonitored, three times per week minimum; and gave DCFS discretion to further liberalize visits to overnights. The court found father to be in partial compliance and ordered six more months of reunification services.

5. Interim review report

DCFS filed an interim review report on June 21, 2007. DCFS reported that father was not in compliance with drug testing. He had missed 10 tests since the six-month review hearing. In addition, father's visits with D.P. were irregular. He visited only once or twice per month for about 15 to 30 minutes. During the visits, however, he was attentive and played with the child. At a hearing that same day, the court admonished

father that his reunification services were coming to an end and he needed to comply with random testing. The court reverted father's visits back to monitored.

D.P., now 17 months old, was continuing to thrive in his grandmother's home, where he had resided since shortly after his birth.

6. Twelve-month review

At the 12-month review hearing, on September 24, 2007, DCFS recommended that the court terminate reunification services because both parents had fallen out of compliance with the reunification plan. Both parents were unemployed and homeless. Father had not completed a domestic violence program and was not enrolled in one. He had previously been enrolled in a domestic violence batterer's program, but he had only attended two classes. The pastor at the program stated that "his attitude left a lot to be desired." When he was allowed to return to the program he "still did not have a change of heart and took no responsibility for his actions whatsoever." Father had not completed a parenting class. He was enrolled in random drug testing, but had failed to test three times. Father's visits with D.P. remained sporadic. He visited D.P. once or twice per month for 15 to 30 minutes.

The court continued the matter to October 18, 2007, for a contested hearing. Father failed to appear at the hearing. The court terminated the parents' reunification services and set a permanency planning hearing.

7. Permanency planning

At the section 366.26 hearing on February 14, 2008, DCFS reported that D.P. continued to thrive in his grandmother's care. Father was not visiting at all. The grandmother's adoptive home study had been completed and approved. DCFS recommended terminating parental rights. At the parents' request, the court set the matter for a contested hearing.

The contested hearing took place on March 27, 2008. By that date, father was visiting regularly, three times per week. According to mother, father stopped testing for drugs, but he did complete a domestic violence program and a parenting program. At the hearing, the court continued the case to June 19, 2008, in order to allow DCFS to

interview all the parties and address the best permanent plan for the child. The court also directed the parents' counsel to submit section 388 petitions.

8. Father's section 388 petition

Father's section 388 petition was filed on May 9, 2008. Father requested a change in the prior order terminating family reunification services. He alleged that he had completed a parenting program, a domestic violence program, individual counseling, and drug rehabilitation. He further claimed that he had tested for drugs until the court terminated family reunification services and that he had been visiting the child three to four times per week. Father further stated that he was employed, had housing, had re-enrolled in drug treatment in February 2008, and had submitted five negative drug tests. Father requested that the court return D.P. to his custody or reinstate reunification services and grant him unmonitored visits. Father alleged that D.P. demonstrated a very close bond with him and followed him everywhere, and that, if the petition were granted, the child would have the opportunity to be part of an intact family with his mother and father.

Attached to the petition was supporting documentation, including completion certificates from a parenting course; a six-month drug treatment program; a six-month program in anger management, domestic violence, and individual counseling; and verification of father's five negative drug screen tests.

The court denied the petition without a hearing. The court found that the petition did not state new evidence or changed circumstances, nor did it show how granting the petition would serve D.P.'s best interests. The court's primary concern was that father had not completed the drug treatment program in which he had re-enrolled in February 2008.

Father filed a timely appeal from the order summarily denying his section 388 petition.

DISCUSSION

I. Law governing the juvenile court's denial of a hearing on father's section 388 petition and standard of review

Under section 388, an interested party may, "upon grounds of change of circumstance or new evidence," petition the juvenile court "for a hearing to change, modify, or set aside any order of court previously made." (§ 388, subd. (a).) "If it appears that the best interests of the child may be promoted by the proposed change of order . . . the court shall order that a hearing be held." (§ 388, subd. (d).)

A party seeking modification bears the burden of showing changed circumstances or new evidence. He "must 'make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]' [Citations.]" (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) There are "two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the [child]. [Citation.]"[4] (*Ibid.*)

California Rules of Court, rule 5.570, governs petitions filed under section 388. It provides: "If the petition fails to state a change of circumstance or new evidence that may require a change of order . . . or that the requested modification would promote the best interest of the child, the court may deny the application ex parte." (Cal. Rules of Court, rule 5.570(d).) Thus, if the petitioner fails to establish either a change of circumstances *or* that the best interest of the child would be promoted by the requested change, the juvenile court may deny the petition without a hearing.

We review the juvenile court's summary denial of a section 388 petition for abuse of discretion. (*In re Anthony W.*, *supra*, 87 Cal.App.4th at p. 250.)

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[4] Father cites *In re Jeremy W.* (1992) 3 Cal.App.4th 1407 for the proposition that, in order to make the prima facie showing required to be granted a hearing on a section 388 petition, the petitioner need only show a change of circumstance or new evidence which might require a change of order. However, as explained in *In re Zachary G.* (1999) 77 Cal.App.4th 799, 807, the petition at issue in *Jeremy W.* contained an implied allegation that the change of order would serve the best interests of the child.

II. Father failed to show changed circumstances

Father argues that, at the time the court terminated his reunification services, he had not completed a parenting class or a domestic violence class. In addition, father admits, he had missed some random drug tests. However, father argues that by the time he filed his section 388 petition seven months later, he had completed both a parenting class and a domestic violence program. He had also resumed drug testing and had five negative tests. Father claims that he had previously completed all other aspects of his case plan, including individual counseling, drug counseling, and AA/NA.

Under the facts of this case, the juvenile court did not abuse its discretion in determining that the changes that father alleged were insufficient to constitute a prima facie case of changed circumstances for the purposes of section 388. In reviewing a parent's showing of changed circumstances, the juvenile court may consider, among other things, the seriousness of the problem leading to the dependency, the nature of the change of circumstance, and the reason the change did not occur sooner. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685.)

One of the primary reasons for father's failure to reunify with D.P. was his history of drug use. Father missed 21 drug tests throughout the reunification period, and failed to submit to an on-demand test. While father had presented evidence that he completed a six-month outpatient alcohol and drug program, he also indicated that he had re-enrolled in a drug program in February 2008 in order to maintain his sobriety. It was father's failure to complete this program which led the court to conclude that father's circumstances had not sufficiently changed. The court noted that "the father has indicated he has reenrolled in a drug program on 2-8 but hasn't completed it yet. . . . He hasn't completed everything, and . . . I'm denying the 388 as there is no change of circumstance."

The court's conclusion that father failed to show changed circumstances because of his failure to complete the drug program is not an abuse of discretion. "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with

the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citations.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) This is precisely what father's request for additional reunification services would have done -- delayed D.P.'s permanent placement to see if, at some future point, father completed the drug program and remained free of illicit drug use. At best, father had shown changing circumstances. This showing did not require the juvenile court to order a hearing.

III. Father failed to show that D.P.'s best interest would be promoted by the change of order

Even if father had made a prima facie showing of changed circumstances, the juvenile court did not abuse its discretion in summarily denying father's 388 petition because father failed to show that D.P.'s best interest would be promoted by father's proposed change of order.

Father's section 388 petition asked the court to return D.P. to father's home; and/or grant father unmonitored visits; and/or reinstate family reunification services. The court did not abuse its discretion in determining that these proposed changes were "not in the minor's best interest."

After the juvenile court terminated father's reunification services, the court's "focus shift[ed] from the parent's custodial interest to the child's need for permanency and stability." (*In re Amber M., supra*, 103 Cal.App.4th at p. 685.) At the time that father's section 388 petition was filed in May 2008, D.P. was two years old and had lived with his maternal grandmother since shortly after his birth. D.P. had never resided with father, and, for the most part, had only monitored contact with him. For much of the reunification period, father's visits were sporadic. While father alleged that D.P. had a very close bond with him, the court did not abuse its discretion in determining that this allegation was insufficient to set forth a prima facie case under section 388. D.P. had lived with his grandmother, and thrived under her care, for his entire life. The court was well within its discretion in determining that D.P.'s interests would not be served by delaying permanency with his grandmother in order to grant father more time.

The court's decision is supported by the Legislative determination that reunification services should not be extended more than 18 months after the child is initially detained. Section 361.5 provides that "court-ordered services may be extended up to a maximum time period not to exceed 18 months after the date the child was originally removed from physical custody of his or her parent or guardian." (§ 361.5, subd. (a)(2).) Absent extraordinary circumstances, a juvenile court abuses its discretion by extending services beyond the 18th month of detention. (*L.A. County Dep't of Children Etc. Servs. v. Superior Court* (1997) 60 Cal.App.4th 1088, 1091.) This "strict time frame" is a "recognition that a child's needs for a permanent and stable home cannot be postponed for an extended period without significant detriment. [Citations.]" (*In re Joshua M.* (1998) 66 Cal.App.4th 458, 474.) In summarily denying father's section 388 petition -- which requested reunification services well beyond the 18-month limit -- the juvenile court recognized this Legislative determination that, 22 months after his initial detention, a child's best interest is served through stability and permanence. No abuse of discretion occurred.

DISPOSITION

The order is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST